

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LEROY HENDERSON, §
TDCJ #834622, §
Petitioner, §
§
v. § CIVIL ACTION NO. H-05-1072
§
DOUG DRETKE, Director, §
Texas Department of Criminal Justice - §
Correctional Institutions Division, §
§
Respondent. §

ORDER OF DISMISSAL

State inmate Leroy Henderson has filed a petition for federal habeas corpus relief under 28 U.S.C. § 2254. The respondent's answer is not yet due. Pending before the Court is a motion by the petitioner to dismiss his federal habeas proceeding "without prejudice" so that he can return to state court to exhaust a claim. Specifically, the petitioner alleges that he is actually innocent, but he appears to concede that he has not fairly presented this claim to the state courts. It is well established that a claim of actual innocence is not cognizable on federal habeas corpus review. *See Herrera v. Collins*, 506 U.S. 390, 400 (1993). The Court concludes therefore that the interests of justice would be better served if the petitioner were allowed an opportunity to present his actual innocence claim at the state court level. Presumably, the respondent is not opposed.

It is **ORDERED** that the petitioner's motion (Docket Entry No. 13) is **GRANTED**, and that this case is **DISMISSED WITHOUT PREJUDICE** so that the petitioner may fully

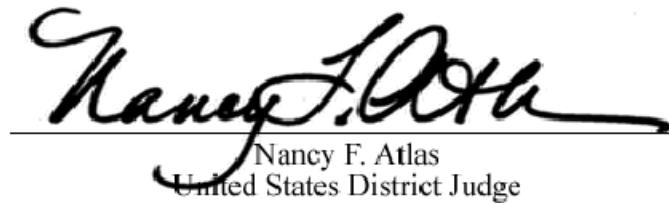
exhaust his state court remedies.

The petitioner is cautioned to promptly and diligently pursue his claims in state court.

The petitioner is reminded that he must comply, if necessary, with the statute of limitations governing federal habeas corpus review.

The Clerk will provide copies of this order to the parties.

SIGNED at Houston, Texas on **September 14, 2005.**



Nancy F. Atlas
Nancy F. Atlas
United States District Judge